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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

DAVID BOESE, Plaintiff and Respondent, v. COUCH OIL & GAS, INC., et al., Defendants and Appellants.	A138323 (Humboldt County Super. Ct. No. DR120529)

David Boese (Boese), pursuant to a subscription agreement, invested several hundred thousand dollars with Couch Oil & Gas, Inc. (Couch Oil). He claims Couch Oil, its principle (Charles Couch), and its representative in California (Greg Tuthill) violated California's Corporate Securities Law of 1968 (Corp. Code, § 25000 et seq.), and wants to litigate his claims in court. Couch Oil and Charles Couch want to arbitrate according to the terms of the subscription agreement, and petitioned to compel arbitration.. The trial court denied the petition on the ground the agreement's arbitration provision is unconscionable. We reverse.

BACKGROUND

Boese contacted Couch Oil, a Texas-based firm, in mid-2010 seeking information about investing in its oil and gas operations. In opposing arbitration, Boese asserted he was not a sophisticated investor when it came to such enterprises, but submitted no information about his wealth or his overall investment experience.

Greg Tuthill, Couch Oil's representative in California, responded to Boese's inquiries, and over the following months, the two spoke multiple times. By December,

Boese concluded he should invest in Couch Oil and scheduled an in-person meeting with Tuthill. The meeting was scheduled at Tuthill's Long Beach office, but Tuthill moved it to a restaurant in Huntington Beach. At the meeting, Tuthill provided Boese with a subscription agreement, by which Boese could purchase a $25,000 stake in Couch Oil's "59 oil wells" prospect. This was the first time Boese had seen a written agreement in connection with the investment. He nonetheless signed it "with no negotiation, revision, or legal review." There is no evidence Boese asked for more time to review the agreement or was pressured to sign within a certain timeframe. Several months later, in February and April 2011, Boese amended his subscription agreement to increase his overall stake to nearly $350,000.

Section 10 of the seven-page subscription agreement is entitled "ARBITRATION OF DISPUTES." It provides, in all capital letters (in contrast to the other provisions of the agreement that are in lower case type):

> "THE UNDERSIGNED ACKNOWLEDGES, BY HIS EXECUTION OF THIS SUBSCRIPTION AND CUSTOMER AGREEMENT, THAT IT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE. BY SIGNING THIS ARBITRATION AGREEMENT, THE PARTIES AGREE AS FOLLOWS:
>
> "a. ALL PARTIES TO THIS AGREEMENT ARE GIVING UP THE RIGHT TO SUE EACH OTHER IN COURT, INCLUDING THE RIGHT TO A TRIAL BY JURY, EXCEPT AS PROVIDED BY THE RULES OF THE ARBITRATION FORUM IN WHICH A CLAIM IS FILED.
> "b. ARBITRATION AWARDS ARE GENERALLY FINAL AND BINDING: A PARTY'S ABILITY TO HAVE A COURT REVERSE OR MODIFY AN ARBITRATION AWARD IS VERY LIMITED.
> "c. THE ABILITY OF THE PARTIES TO OBTAIN DOCUMENTS, WITNESS STATEMENTS AND OTHER DISCOVERY IS GENERALLY MORE LIMITED IN ARBITRATION THAN IN COURT PROCEEDINGS.
> "d. THE ARBITRATORS DO NOT HAVE TO EXPLAIN THE REASON(S) FOR THEIR AWARD.
> "e. THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WERE OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY.
> "f. THE RULES OF SOME ARBITRATION FORUMS MAY IMPOSE TIME LIMITS FOR BRINGING A CLAIM IN ARBITRATION. IN

SOME CASES, A CLAIM THAT IS INELIGIBLE FOR ARBITRATION MAYBE BROUGHT IN COURT.

"f [*sic*]. THE RULES OF THE ARBITRATION FORUM IN WHICH THE CLAIM IS FILED, AND ANY AMENDMENTS THERETO, SHALL BE INCORPORATED INTO THIS AGREEMENT.

"IN THE EVENT THAT A DISPUTE ARISES BETWEEN THE UNDERSIGNED SUBSCRIBER AND THE COMPANY, OR ANY OF THEIR LEGAL REPRESENTATIVES, ATTORNEYS, ACCOUNTANTS, AGENTS, OR EMPLOYEES, SAID DISPUTE ARISING OUT OF, IN CONNECTION WITH OR AS A RESULT OF THE SUBSCRIPTION HEREBY MADE, THE UNDERSIGNED HEREBY EXPRESSLY AGREES THAT SAID DISPUTE SHALL BE RESOLVED THROUGH ARBITRA TION RATHER THAN LITIGA TION. THE UNDERSIGNED HEREBY AGREES TO SUBMIT THE DISPUTE FOR RESOLUTION TO THE AMERICAN ARBITRATION ASSOCIATION, IN DALLAS, TEXAS FOR HEARING IN DALLAS, TEXAS. THE FEDERAL ARBITRATION ACT SHALL GOVERN THE PROCEEDING AND ALL ISSUES RAISED BY THIS AGREEMENT TO ARBITRATE.

This is the last section of the agreement, and the signature block is directly below it. The signature block, itself, further warns: "This agreement contains a pre-dispute arbitration clause, which begins on Page 6."

In September 2011, Boese's investment was not performing as he had anticipated, and he became suspicious about Couch Oil and sought the return of his funds. The company refused to return most of the money.

Boese eventually filed suit against Couch Oil, Charles Couch, and Tuthill in Humboldt County Superior Court. He alleged violations of California's Corporate Securities Law of 1968, namely Corporations Code section 25110 (offer or sale of unqualified and non-exempt securities) and Corporations Code section 25401 (misrepresentation or omission of material fact in offer or sale of securities). He sought recission of the subscription agreement, restitution of his unreturned investment funds, prejudgment interest, and costs and legal fees.

Couch Oil and Couch filed a petition to compel arbitration.[1] The trial court denied the petition, ruling the arbitration provision unconscionable. The court concluded the provision was "procedurally" unconscionable because the parties were of unequal bargaining power, they did not discuss arbitration, the provision was not subjected to negotiation, revision, or legal review, and Boese lacked a "meaningful choice." It concluded the provision was "substantively" unconscionable because it provided limited procedural safeguards.

Couch Oil and Couch (hereinafter, collectively, Couch) filed a timely notice of appeal. (See Civ. Proc. Code § 1294, subd. (a).)

DISCUSSION

Under the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.), "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) There is no dispute the FAA applies to the subscription agreement between Boese of California and Couch of Texas.

In California, a court may refuse to enforce a contract, refuse to enforce any clause of the contract, or limit the application of any clause, if it finds the contract or clause, as a matter of law, is unconscionable. (Civ. Code, § 1670.5.) Our Supreme Court also recently confirmed that unconscionability, a doctrine applicable to "any contract," as per the FAA, "remains a valid defense to a petition to compel arbitration." (*Sonic-Calabasas A, Inc. v. Moreno* (Cal. 2013) 57 Cal.4th 1109, 1142 (*Sonic-Calabasas*); accord, *Chavarria v. Ralphs Grocery Co.* (9th Cir. 2013) 733 F.3d 916 [applying the unconscionability doctrine].)

When no material facts are disputed, we determine unconscionability de novo. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*); *O'Donoghue v. Superior Court* (2013) 219 Cal.App.4th

[1] Apparently, Tuthill did not move to compel arbitration. The parties make no reference to Tuthill on appeal.

245, 258 (*O'Donoghue*) [" 'Unconscionability is ultimately a question of law, which we review de novo when no meaningful factual disputes exist as to the evidence.' "].) To the extent the trial court resolved any disputed material fact, we accept that resolution if supported by substantial evidence. (*Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 953 (*Brown*).)

"The party resisting arbitration bears the burden of proving unconscionability. [Citations.] Both procedural unconscionability and substantive unconscionability must be shown, but 'they need not be present in the same degree' and are evaluated on ' "a sliding scale." ' [Citation.] '[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' [Citation.]" (*Pinnacle, supra*, 55 Cal.4th at p. 247.) "The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power" while "[s]ubstantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." (*Id.* at p. 246.) "A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience." ' "[2] (*Ibid.*)

Here, we are hard pressed to find any procedural unconscionability in connection with the subscription agreement. The subscription agreement was, indeed, a form agreement, and it was prepared by Couch, which presumably was more knowledgeable about its oil and gas business and subscription agreements than Boese. But the mere fact an agreement has attributes of an adhesive contract does not end the inquiry. (*Pinnacle, supra*, 55 Cal.4th at p. 248 [rejecting claim of procedural unconscionability, although a condominium project's CC&Rs "may perhaps be viewed as adhesive"]; *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1470, fn. 2 (*Roman*) ["The adhesive nature

[2] In *Sonic-Calabasas*, the court approved *Pinnacle*'s language, stating it is one of several ways in which the courts have expressed that " ' "[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." ' " (*Sonic-Calabasas, supra,* 57 Cal.4th at p. 1159.)

of the contract will not always make it procedurally unconscionable."]; *Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1470 (*Peng*) [" 'this adhesive aspect of an agreement is not dispositive' "].)

The record is bereft of evidence of surprise or oppression due to unequal bargaining power, which is the focus of procedural unconscionability. The arbitration provision is not hidden in the fine print of a prolix agreement. On the contrary, it appears in all capital letters in an ordinary font, and occupies a full page of a relatively short agreement, which Boese had the opportunity to review (even if he did not avail himself of it). The provision appears just above the signature block, which itself warns the subscriber of predispute arbitration. (See *O'Donoghue*, *supra*, 219 Cal.App.4th at p. 259 [noting all of these factors militate against surprise]; *Robison v. City of Manteca* (2000) 78 Cal.App.4th 452, 459 (*Robinson*) [no procedural unsconscionability when employee not "prevented from reading the agreement on the day of execution" even if "it was open[ed] to the signature page"], italics omitted.)

There is no evidence Boese lacked the opportunity to negotiate, tried to negotiate, or was pressured to sign the agreement at the meeting with Tuthill. Boese made no claim that he asked for time to review the agreement, but was refused or dissuaded from doing so. In fact, in the four months after his initial subscription, Boese invested substantial additional funds, having had time in the interim to further review the terms of the agreement. Nor was Couch under any obligation to specifically explain the arbitration provision to Boese. (*O'Donoghue*, *supra*, 219 Cal.App.4th at p. 259.)

Even assuming the subscription agreement was presented on a take-it-or-leave-it basis, Boese was free to walk away and invest his money elsewhere. Indeed, it was Boese who had sought out Couch, not the other way around. He did not face the same kind of pressure as, for example, a franchisee who needs to extend a franchise license or a computer software user upon whom terms of use are foisted without even an opportunity for dialog. (See *Bolter v. Superior Court* (2001) 87 Cal.App.4th 900, 907 ["Petitioners were told they must agree to the new franchise terms in order to continue running their franchises. Only a person contemplating whether to purchase a franchise for the first

time would have been in the position to reject Harris's 'take it or leave it' attitude"]; *Aral v. EarthLink, Inc.* (2005) 134 Cal.App.4th 544, 557 [clickwrap or shrinkwrap agreements on a take it or leave it basis are procedurally unconscionable], called into doubt on other ground by *AT&T Mobility LLC v. Concepcion* (2011) __ U.S. __ [131 S.Ct. 1740, 1746] (*Concepcion*).)

In short, on the issue of procedural unconscionability, all the evidence shows here is a short form agreement with a highlighted arbitration provision prepared by the seller of a nonessential product, which Boese had every opportunity to review. In our view, this does not suffice to establish procedural unconscionablity. (See *O'Donoghue*, *supra*, 219 Cal.App.4th at pp. 258–261 [likely not "any" procedural unconscionability without surprise or oppression]; *Roman*, *supra*, 172 Cal.App.4th at pp. 1470–1471 ["whatever" procedural unconscionably inherent in an arbitration clause in seven-page adhesive employment agreement was limited at best]; *Robinson*, *supra*, 78 Cal.App.4th at p. 459 [adhesive agreement not procedurally unconscionable].)

Nevertheless, assuming the barest modicum of procedural unconscionability, we turn to whether the arbitration provision is substantively unconscionable—that is, whether it is so "overly harsh or one-sided" as to "shock the conscience." (*Pinnacle*, *supra*, 55 Cal.4th at p. 246.) " 'When, as here, . . . "the degree of procedural unconscionability of an adhesion agreement is low, and the agreement will be enforceable unless the degree of substantive unconscionability is high." [Citations.]' [Citation.]" (*Peng*, *supra*, 219 Cal.App.4th at p. 1470.)

Boese presses several arguments in support of the trial court's substantive unconscionability determination. While acknowledging the arbitration provision is mutual on its face (requiring both parties to arbitrate all disputes arising under the subscription agreement), he contends mutuality is actually illusory because he is more likely to have reason to sue Couch than the other way around. Even if that might be true, perfect mutuality in any given contractual term is not required and unlikely to be achieved. (See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 117 [there need be only a "modicum of bilaterality" in an arbitration

agreement]; *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1585 [denying enforcement of arbitration provision because its infirmity was not solely that one party "was more likely to sue than be sued," a condition that would not, itself, threaten enforcement].) Further, invalidating an *arbitration* provision whenever one party might have more claims than the other would appear to implicate the prohibition in *Concepcion* and the FAA against state law rules discriminating against arbitration. (See *Concepcion*, *supra*, 131 S.Ct. at p. 1746; 9 U.S.C. § 2; see also *Sonic-Calabasas*, *supra*, 163 Cal.Rptr.3d at p. 285.)

Boese also contends limited discovery makes the arbitration provision unconscionable. He did not, however, make any showing on what discovery limitations he would face in a American Arbitration Association (AAA) arbitration with Couch. Rather, he pointed to the generic warning in the arbitration provision that the parties' ability "TO OBTAIN DOCUMENTS, WITNESS STATEMENTS AND OTHER DISCOVERY IS GENERALLY MORE LIMITED IN ARBITRATION THAN IN COURT PROCEEDINGS." (JA 25.) This cautionary provision does not say anything about the discovery rules of the AAA, which would govern these parties.[3] (JA 25-26.) Further, in *Sonic- Calabasas* our Supreme Court emphasized that the fundamental attributes of arbitration are achieved when arbitration procedures, including those pertaining to discovery, do *not* "mimic court proceedings." (*Sonic-Calabasas*, *supra*, 57 Cal.4th at p. 1143, citing *Concepcion*, *supra*, 131 S.Ct. at p. 1747.)

Boese also attacks the warning that "THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WERE OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY." But, again, he has failed to produce any evidence as to how such a warning harms him or any evidence as to what the arbitration rules actually require. Moreover, he produced no evidence of how having a

[3] Boese makes no complaint that the AAA rules were not physically appended to the subscription agreement. Nor would such an assertion advance his unconscionability argument. (*Peng*, *supra*, 219 Cal.App.4th at p. 1472 [failure to attach rules not unconscionable].)

minority of industry experts on the panel would do anything other than assure a fair dispute resolution. Such a requirement, if it is a requirement, is not unconscionable. (*Brown*, *supra*, 168 Cal.App.4th at p. 957.)

Indeed, all the warnings about arbitration set forth in the agreement, which the trial court concluded contributed to the substantive unconscionability of the arbitration provision, are derived from a well-used template for arbitration agreements used in the securities industry and approved by the SEC. (See 54 Fed. Reg. 21144 (May 16, 1989) [adopting rule NASD 3110(f), requiring pre-arbitration disclosure provisions]; 76 Fed. Reg. 5850 (Feb. 2, 2011) [adopting NASD rule 3110(f) as current FINRA rule 2268;[4] *Brown*, *supra*, 168 Cal.App.4th at pp. 948–949, 955–956 [noting SEC approval of rules]; *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 13 [noting another agreement using this template].) While the SEC's approval may not bind us, we note the SEC is a powerful regulatory agency that is focused on protecting the integrity of the securities marketplace. (See *Pinnacle*, *supra*, 55 Cal.4th at p. 248; see also *Brown*, *supra*, 168 Cal.App.4th at p. 956 ["We likewise are reluctant to find that the SEC-approved NASD Code is unconscionable."].) We do not see how inclusion of these general *cautionary* provisions, approved by an important regulatory watchdog, can create substantive unconscionability. On the contrary, they are akin to a banner of yellow warning flags and are consumer friendly. (See 54 Fed. Reg. 21144 (May 16, 1989) [provisions "address many of the concerns regarding customer notice and choice that have been considered over recent years in open Commission meetings" so as to "promote more knowledgeable acquiescence or rejection by customers of arbitration provisions"]; *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 953 [the SEC's approval of a rule, such as those governing arbitration, assures "consisten[cy] with the requirements and goals of the [Securities and Exchange Act] 'to protect investors and the public interest' "].)

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[4] Financial Industry Regulatory Authority (FINRA) rule 2268 is available at <http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9955> [as of Feb. 28, 2014].

Boese lastly complains the arbitration would be held in Texas. He does not cite cost as a problem (see *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 496 [indeed " '[m]ere inconvenience or additional expense is not the test of unreasonableness' "]), but bias. The trial court did not reach Boese's bias argument, and we reject it outright. Boese's assertion in his declaration that his "research and extensive conversations with experts and consultants in Texas, lead me to believe that I will not receive an even-handed hearing at an arbitration in Dallas, Texas" is inadmissible hearsay and improper lay opinion, as well as conclusory and opaque. There is no competent evidence in the record that even hints a AAA arbitration held in Texas could not, or would not, be fair, or could not, or would not, award Boese any California-specific relief to which he might be entitled under California law. (See *Brown, supra*, 168 Cal.App.4th at p. 957 [no reason plaintiffs cannot pursue specific California remedies, including punitive damages, in arbitration].)

In sum, Boese did not carry his burden of demonstrating the arbitration provision in the subscription agreement is unconscionable and therefore unenforceable, and the trial court erred in denying Couch's petition to compel arbitration.

DISPOSITION

The order denying the petition to compel arbitration is reversed, and the trial court is directed to enter an order granting the petition. Appellants to recover costs on appeal.

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Banke, J.

We concur:

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Margulies, Acting P. J.

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Dondero, J.